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No. 92-433

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SEARS, ROEBUCK & COMPANY,
Petitioner,

v.

LOUIS J. BARATTINI, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a plaintiff has an absolute right fraudulently to join a party for the sole purpose of defeating federal diversity jurisdiction so long as the complaint adequately alleges a cause of action against a third party.

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BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amicus Lawyers for Civil Justice ("LCJ") is a nationwide coalition of corporate and defense counsel. LCJ works closely with over 60 state defense bar associations throughout the country. Its members are litigators and litigation managers who are engaged in a substantial amount of civil litigation, much of it complex, in the state and federal courts of the United States. LCJ and its members are vitally interested in developing workable improvements to the civil justice system that are fair and equitable to all parties.[1]

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of this Court.

REASONS FOR GRANTING THE PETITION

1. The right to remove cases from state to federal courts, with its origins to the Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 12, has been part of federal law as long as diversity jurisdiction itself, and was designed to serve the same purposes. 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 3721, at 187 (2d ed. 1985) (hereinafter "Wright, Miller & Cooper"). Those purposes most commonly have been to protect out-of-state litigants from "local prejudices and sectional views." *Burgess* v. *Seligman*, 107 U.S. 20, 34 (1883). More specifically, access to federal courts exists "to protect commercial interests from class bias." 13B Wright, Miller & Cooper, § 3601, at 339. Diversity jurisdiction was thus designed "to foster investment and commerce across state lines by ensuring impartial administration of the law and protecting out-of-state litigants from local prejudices." Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way With Its Feet?*, 61 N.Y. St. B.J. 20, 20 (1989).[2]

While some of the "sectional views" and intra-state jealousies of the Nation's early years may have faded, "[t]he 'hometown decision' and the one-industry county are continuing realities," and "[b]ias still seems to exist with respect to persons and corporations from a more distant part of the country." *Id.* at 21.[3] Indeed, out-of-

[2] *See also* Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Prob. 3, 27-28 (1948).

[3] In Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv. L. Rev. 317, 339 (1977), the author quotes one judge in the old Fifth Circuit as observing:

> There are state courts in some areas where, from my experience as a practicing lawyer and my observation as a judge, such a forum [where a litigant can feel he is getting a fair trial] is not available to a nonresident plaintiff, individual or corporate. The result is sometimes a foregone conclusion in less populated areas. . . . The reasons for the creation of diversity jurisdiction still exist in many areas of the country, in my opinion.

state corporations may well be one of the principal objects of local prejudice.[4] Moreover, because

> state venue provisions often localize the place of trial in small constituencies[,] . . . justice is likely to be impeded by the provincialism of the local judge and jury, the tendency to favor one of their own against an outsider, and the machinations of the 'court house gang' . . . . [T]he federal courts, with their juries drawn on a district-wide basis and with their judges appointed for life by the President, have always protected out-of-staters from this type of inadequacy of justice.

American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft*, 106-07 (1969) (hereinafter "ALI Study").[5]

Although empirical evidence of bias and impediments to impartial adjudication is difficult to gather, these problems are by no means theoretical. It is widely accepted, for example, that Pennzoil's ability to try its now-famous case against Texaco before a Texas state court jury was a key to obtaining one of the largest verdicts in American history. As the West Virginia Supreme Court explained,

> [a]lthough the name Texaco suggests that the company might get a friendly hearing in Texas, this has long since ceased being the case. Texaco long ago stopped wearing cowboy boots and ten-gallon hats, moved its corporate headquarters to the suburbs of New York City, and tried very hard to forget its humble origins in the Texas boondocks. Pennzoil, on the other hand, continues to maintain its corporate headquarters in Houston. And so it came to pass that Pennzoil sued Texaco in a friendly, home-town

[4] *See* 14A Wright, Miller & Cooper, § 3601, at 357 n.68.

[5] *See also* R. Neely, *The Product Liability Mess: How Business Can Be Rescued from the Politics of State Courts*, 61-62 (1988).

> Texas state trial court where it recovered a judgment (including a punitive damages award of $3 *billion*) that, after the inclusion of interest and costs, exceeded the gross national product of over one-quarter of the member states of the United Nations.
>
> . . .

Garnes v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 907 n.5 (W. Va. 1991).[6]

Similarly, in the litigation over baseball star Pete Rose's expulsion from major league baseball for allegedly betting on the game, Rose tried desperately—and with some initial success—to have his case heard in state court. As one commentator explained, "[t]he state judge, Norbert Nadel, was up for re-election in 1990, and, given Rose's extreme popularity in Cincinnati, it was widely thought that as a political matter he had little choice but to bend over backwards for Rose." Neiman, *"Root, Root, Root for the Home Team": Pete Rose, Nominal Parties, and Diversity Jurisdiction*, 66 N.Y.U. L. Rev. 148, 150 n.15 (1991). See also ALI Study at 160 ("[s]o long as diversity jurisdiction exists . . . the need for its assertion may well be greatest when the plaintiff tries hardest to defeat it").

2. The extraordinary and improper lengths to which respondent's counsel went in this case to attempt to prevent litigation in federal court likewise speak volumes about the benefits counsel perceived in a "home court" advantage. The district court found after a hearing that respondent engaged in "a blatant attempt to circumvent the federal court's exercise of diversity jurisdiction," then

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[6] Thus, "[a]ctual prejudice aside, there remains the matter of the *appearance* of prejudice, or the belief of an out-of-state party that he may be the victim of prejudice. . . . This is a matter of no little consequence in a nation that prides itself not only on doing justice, but on being seen to do justice." Shapiro, *supra* n.3, at 330 (emphasis in original).

"flaunt[ed]" Section 1446(b)'s subsequently enacted one-year limitation as a bar to petitioner's right to remove the case to a federal forum. Pet. App. 13a. Notwithstanding this Court's admonition that "the Federal courts should not sanction devices intended to prevent a removal," *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907), the Fifth Circuit held that district courts are powerless to remedy fraudulent joinders of diversity-destroying defendants unless the plaintiff's bad faith is plain on the face of the complaint. The Fifth Circuit's extraordinary and unduly narrow standard of procedural fraud conflicts with the standards announced by this Court and followed by the Third and Tenth Circuits, and effectively vitiates the important protections of the removal statute.

a. As this Court has long recognized, the equitable principle that "no man may take advantage of his own wrong [is] . . . [d]eeply rooted in our jurisprudence . . . and has frequently been employed to bar inequitable reliance on statutes of limitations." *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959). The doctrine that "[e]quity will not lend itself to . . . fraud . . . is read into every federal statute of limitation." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-97 (1946).[7] Indeed, the need to protect litigants and courts from fraudulent misuse of the judicial system is so important that courts may set aside final judgments at any time in order to remedy fraud upon the courts. See Fed. R. Civ. P. 60(b).

Despite these well-settled principles, the Fifth Circuit ruled that, except in cases involving the pleading of juris-

[7] *See also Irwin* v. *Veterans Admin.*, 111 S. Ct. 453, 457 (1990) (equitable tolling applies in suits against government notwithstanding requirement that waivers of sovereign immunity be narrowly construed; *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 559 (1974) ("this Court has not hesitated to find the statutory period tolled or suspended by [fraudulent] conduct . . .").

dictional facts, the one-year limitation of 28 U.S.C. § 1446(b) may not be tolled unless it is clear from the pleadings themselves that "there [is] no possibility of a valid state cause of action being set forth against the in-state defendant(s)." Pet. App. 6a (internal quotation marks and citation omitted). Viewing "fraud in this context [as] a term of art," *id.*, the court of appeals concluded that a plaintiff's intention not to pursue claims against a diversity-destroying defendant did not render joinder of such a defendant improper. *Id.* at 9a. This "strict view of fraudulent joinder" (*id.* at 6a) is flatly inconsistent with this Court's cases.

In determining the propriety of diversity-defeating joinders, this Court has not limited its inquiry to an examination of whether the plaintiff's claim has a colorable legal basis, but has instead considered the plaintiff's "real purpose in joining" such a defendant, *Wecker*, 204 U.S. at 186, and the non-diverse defendant's "real connection to the controversy." *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). The Court has explained that where "a resident defendant is joined, the joinder, *although fair upon its face*, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal." *Id.* (emphasis added).[8] And it has upheld refusals to remand where the facts presented to the district courts demonstrated that a plaintiff had joined a defendant "without any purpose to prosecute the action in good faith . . . and with the purpose of fraudulently defeating the employer's right of removal." *Id.* at 98.[9] In both *Wilson* and *Wecker*, moreover, the Court

[8] *See also Chesapeake & Ohio Ry.* v. *Cockrell*, 232 U.S. 146, 152 (1914) ("[W]hen . . . a resident defendant is joined with the non-resident, the joinder, *even although fair upon its face*, may be shown by a petition for removal to be only a fraudulent device to prevent a removal") (emphasis added).

[9] *See also Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 185 (1905) (upholding determination of improper joinder

found it unnecessary to decide the very question that the Fifth Circuit deemed dispositive—*i.e.*, whether the plaintiff could state a viable claim against the resident defendant.[10]

b. The Fifth Circuit's rule places it in conflict with the Tenth and Third Circuits, both of which have remained faithful to this Court's teachings. Citing *Wilson*, the Tenth Circuit has ruled that "upon allegations of fraudulent joinder designed to prevent removal, federal courts may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal." *Smoot* v. *Chicago, R.I. & Pac. R.R.*, 378 F.2d 879, 881-82 (10th Cir. 1967). Similarly, the Third Circuit has concluded that fraudulent joinder may be found both where there is no colorable legal basis for a claim brought against a resident defendant, "or no real intention in good faith to prosecute the action against" such a defendant. *Abels* v. *State Farm Fire & Cas. Co.*, 770 F.2d 26, 32 (3d Cir. 1985). These circuits have recognized that where fraudulent joinder is alleged, courts may "pierce the pleadings, . . . [and] consider the entire record," *Smoot*, 378 F.2d at 882 (citations omitted), including whether the "[p]laintiffs' conduct . . . is con-

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"[i]n view of th[e] testimony and the apparent want of basis for the allegations of the petition as to [the resident defendant's] relations to" the case).

[10] *See Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 98-99 (1921) ("the parties differ as to whether local law gives any color for treating the employer and the coemployee as jointly liable. . . . But we do not find it necessary to solve this question. As the joinder was a sham and fraudulent . . . the result must be the same whether the local law makes for or against a joint liability"); *Wecker*, 204 U.S. at 183 ("Much discussion is had in this case as to whether . . . the corporation and [resident defendant] could be jointly held responsible to the plaintiff upon the allegations of the complaint, but we do not deem it necessary to determine that question").

sistent with an intention to actually proceed against" the resident defendant. *Abels*, 770 F.2d at 32.

c. The Fifth Circuit's contrary rule finds no support in logic or law. The principal evil of fraud is its capacity to deceive. Perversely, the Fifth Circuit's rule permits equitable tolling only in those cases where courts and litigants are least likely to be deceived by a plaintiff's bad faith. There is simply no sensible reason to limit equitable relief to fraudulent acts that are obvious. Indeed, cases involving other types of fraud upon the courts routinely entail inquires beyond the face of pleadings.[11]

In fact, the Fifth Circuit itself recognizes the need to pierce the pleadings to determine the validity of *jurisdictional* facts. Yet as this case and others demonstrate, the *bona fides* of a plaintiff's intent to pursue claims against resident defendants are as readily ascertainable as jurisdictional facts, which themselves can involve questions of intent.[12]

In any event, a need for certainty and ease of administration cannot take precedence over a defendant's statutory right to a federal forum. In cases cognizable under 28 U.S.C. § 1332, Congress has afforded defendants the right to remove actions to federal court where "none of the parties in interest *properly joined* and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (emphasis added). De-

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[11] *See, e.g., Toscano* v. *Commissioner*, 441 F.2d 930, 934 (9th Cir. 1971) (on motion under Rule 60(b), examining acts by prevailing party that "prevented the losing party from fully and fairly presenting his case or defense"); 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2870, at 255 (1973) (fraud upon the court includes bribery and other instances of improper influence upon the court).

[12] Jurisdictional facts, for example, may turn on such questions as whether a resident had responsibility for supervising workers or ensuring safety of the workplace. *See, e.g., Wecker*, 204 U.S. at 184-85.

spite the express statutory requirement of proper joinder, the Fifth Circuit has concluded that a plaintiff can deprive a defendant of its right of removal through bad faith and improper joinder of a resident defendant, provided the impropriety is not obvious. There is simply no basis in the language of the removal statute for such a perverse result.

The Fifth Circuit's rule permits plaintiffs to undermine entirely the protections that diversity jurisdiction provides out-of-state litigants simply by alleging a claim against an in-state defendant. The important public policy favoring access to federal court should not turn on mere allegations, when the falsity of those allegations has been clearly demonstrated as found by a trial court. In particular, access to federal court should not be denied where allegations are made with intent to defraud the court. This Court should review the decision below to enforce the centuries-old assurance from Congress that non-resident litigants will have access to "courts free from susceptibility to potential local bias," *Guarantee Trust Co.* v. *York*, 326 U.S. 99, 111 (1945), and to make clear that such access cannot be blocked by fraud.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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